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Criminal Law - Article 27 of the Criminal Code - Attempted Perjury

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Testimony of two of the defendant's witnesses showed a general custom to put contracts for the removal of dirt in writing. The court also considered it doubtful that a bonding company would have given a performance bond on a mere oral agreement.[14] All these factors tend to show that the parties intended to be bound only upon the execution of a written agreement. The questionable facet of the decision, however, is the court's indication that there may be a binding oral agreement even though the parties agree to reduce it to writing, provided that the agreement to reduce to writing is made *subsequent* to the oral agreement. This same view, the court noted, had been taken in decisions prior to the instant case.[15] Actually the difficulty in cases of this kind is caused by the fact that the intention to execute a writing is voiced at the time the oral agreement is made. If a binding oral contract is entered into, the fact that the parties may later agree to reduce it to writing, and do not, should be immaterial.[16] Aside from the questionable position just discussed, however, the Louisiana jurisprudence seems to be in accord with that of other American jurisdictions[17] and consistent with the sound principle that contracts should be given the effect intended by the parties.

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CRIMINAL LAW—ARTICLE 27 OF THE CRIMINAL CODE—ATTEMPTED PERJURY

Defendant was indicted and tried for committing perjury by testifying falsely as a witness before the Grand Jury of Acadia Parish. Although the evidence indicated that a conviction for perjury would probably have been more appropriate, the jury returned a verdict of guilty of attempted perjury. The defendant appealed, contending that there can be no crime of attempted perjury in that it is impossible to commit attempted perjury without completing the intended crime. *Held*, affirmed. There is a crime of attempted perjury and the conviction was responsive

14. Transcript of Record, Docket No. 41,474, p. 153, Breaux Brothers Construction Co. v. Associated Contractors, Inc., 77 So.2d 17 (La. 1954).

15. Gilmore v. O'Brien, 125 La. 904, 51 So. 1031 (1910); Fredericks v. Fasnacht, 30 La. Ann. 117 (1878); Avendano v. Arthur & Co., 30 La. Ann. 316 (1878).

16. There would, of course, be at least a remote possibility of finding in the subsequent agreement an implied mutual rescission of the prior oral contract.

17. Annot., 165 A.L.R. 756 (1946). See RESTATEMENT, CONTRACTS § 26 (1932).

to the indictment for perjury. *State v. Latiolais*, 225 La. 878, 74 So.2d 148 (1954).

Prior to the adoption of the Criminal Code of 1942,[1] Louisiana had no general law concerning the attempt to commit a crime. Some attempts were defined separately in miscellaneous statutes;[2] others were included in the broad definitions of basic crimes.[3] In many instances, however, the person whose efforts fell short of the completed crime was entirely free from criminal liability. Consolidation of these numerous statutes was achieved by article 27 of the Criminal Code. Under the Code, the elements of the crime of attempt are a specific intent to commit a crime[4] and an act or omission done for the purpose of and tending directly toward accomplishing this object.[5] The article settles several questions which have been troublesome in this and other jurisdictions. First, the article rejects the common law doctrine permitting impossibility of commission of the attempted crime to be pleaded as a defense.[6] It provides that it is not material whether, under the circumstances, the offender would have been able to accomplish his purpose.[7] Second, the common law rule that the attempt must be ineffectual is rejected.[8] Third, although

1. LA. R.S. 14:1 *et seq.* (1950).

2. LA. REV. STAT. § 861 (1870) (attempt to corrupt jurors); LA. REV. STAT. § 791 (1870) (assault with intent to murder); Art. 362, LA. CODE OF CRIM. PROC. (1928) (attempt to influence jurors).

3. *E.g.*, La. Acts 1932, No. 186, p. 578 (arson and attempted arson).

4. This element is largely self-explanatory. In addition to the tests provided by articles 10 and 11 of the Criminal Code, defining specific intent, the jurisprudential test for determining the specific intent referred to in this article has been whether or not the defendant would have been guilty of a crime if his intentions had been fully consummated. State v. Harper, 205 La. 228, 17 So.2d 260 (1944); LA. R.S. 14:10-11 (1950); Comment, Art. 27, LA. CRIM. CODE ANN. (1942). See also State v. Murff, 215 La. 40, 39 So.2d 817 (1949).

5. LA. R.S. 14:27 (1950); State v. Carter, 213 La. 829, 35 So.2d 747 (1948); State v. Roberts, 213 La. 559, 35 So.2d 216 (1948).

6. In other jurisdictions the decisions are not harmonious as to whether or not "impossibility" is a defense to the charge of attempt and, if so, under what circumstances. For a recent discussion of the problem as it relates to the instant case, see Note, 29 TUL. L. REV. 149 (1954). See also State v. Mitchell, 170 Mo. 633, 71 S.W. 175 (1902); People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (1906); Commonwealth v. Johnson, 312 Pa. 140, 167 Atl. 344 (1933).

7. LA. R.S. 14:27(1) (1950). This rule is a continuation of the principle embodied in the old "attempted robbery" statute which included as a criminal attempt the mere "thrusting the hands into the pockets" of the victim with the intent to steal. LA. REV. STAT. § 811 (1870).

8. "[A]ny person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was actually perpetrated by such person in pursuance of such attempt." LA. R.S. 14:27 (1950). The common law view has been expressed as follows: "A failure to consummate a crime is as much an element of an attempt to

the article includes the requirement that mere preparation to commit a crime will not constitute an attempt, it further provides that either searching for, or lying in wait for the intended victim with a dangerous weapon and with the specific intent to commit a crime shall be sufficient to constitute an attempt.[9] These latter provisions were included because of problems which have arisen here and elsewhere.[10] The scope of article 27 was considered in the case of *State v. Broadnax*[11] where the question was presented whether it embraced attempts to commit *all* crimes, even those not included in the Criminal Code. In answer the court said that the article was intended "to be of a general nature, punishing *all* attempts to commit *any* crimes."[12] (Emphasis added.) In spite of this, there are a few crimes which by their nature are outside the scope of article 27. For example, since one cannot intend to be negligent, there can be no crime of attempted negligent homicide or attempted negligent injuring.[13] Similarly there can be no attempt to commit felony-murder[14] or involuntary manslaughter,[15] for these crimes involve situations in which the offender is criminally responsible for unintended homicides. The definitions of these crimes exclude the possibility of the specific

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commit it as the intent and the performance of an act towards its commission." 1 HITCHLER, THE LAW OF CRIMES 188, 194, 195 (1939).

See also People v. Miller, 42 P.2d 308 (Cal. 1935); Nemecek v. State, 114 P.2d 493 (Okla. 1941); CLARK & MARSHALL, LAW OF CRIMES §§ 113, 116 (5th ed. 1952).

9. LA. R.S. 14:27 (1950). The question as to when the overt act has gone beyond the zone of "mere preparation," although difficult, is basically one of nearness and degree most often left for the jury. State v. Carter, 213 La. 829, 35 So.2d 747 (1948).

10. The comment following the article in the LA. CRIM. CODE ANN. (1942) indicates that by including the "searching for" provision the reporters wished to cover a problem which had not arisen in Louisiana. In a New York case several armed men were searching for a paymaster intending to rob him when they were apprehended by the police. The court held that since they had not yet found their victim their conduct was not sufficient to make them guilty of attempted robbery. People v. Rizzo, 246 N.Y. 334, 158 N.E. 888 (1927). The "lying in wait with a dangerous weapon" provision is a continuation of Louisiana's policy of punishing "lying in wait" to commit serious crimes. La. Acts 1892, No. 26, p. 36; LA. REV. STAT. § 790 (1870) (lying in wait); La. Acts 1882, No. 24, p. 40 (wounding while lying in wait).

11. 216 La. 1003, 45 So.2d 604 (1950). This decision is judicial recognition that, as was evidently intended by the reporters of the Code, the general principles of criminal law which are expressed in Title I of the Criminal Code apply to *all* crimes, whether included in the Criminal Code or not. LA. R.S. 14:1-28 (1950).

12. State v. Broadnax, 216 La. 1003, 1021, 45 So.2d 604, 610 (1950). See also Comment, Art. 27, LA. CRIM. CODE ANN. (1942): "An attempt to commit *any* crime is an offense. . . ."

13. State v. Adams, 210 La. 782, 28 So.2d 269 (1946), 8 LOUISIANA LAW REVIEW 282 (1948).

14. LA. R.S. 14:30(2) (1950).

15. LA. R.S. 14:31(2) (1950).

intent essential to an attempt. Also, there can be no attempted assault insofar as assault is defined as an attempted battery, for it is inconceivable that there could be an attempt to attempt a crime.[16] Nor can there be an attempted conspiracy to commit a crime because the courts have properly refused to apply the principle of the inchoate crime of attempt to other inchoate offenses.[17]

In the instant case the defendant contended that perjury is one of those crimes not subject to the attempt article. In rejecting this argument the court cited article 27 of the Criminal Code[18] and article 406 of the Code of Criminal Procedure[19] to demonstrate that a verdict of guilty of attempted perjury is responsive to an indictment for perjury. Paragraph 3 of article 27 provides in part that "an attempt is a separate but lesser grade of the intended crime," while article 406 provides that "when the crime charged includes another of a lesser grade, a verdict of guilty of the lesser crime is responsive to the indictment." Although not necessary to the decision in the instant case, to show that it is possible to commit attempted perjury without committing perjury itself, the court posed the hypothetical situation of a witness testifying falsely before a board or official that for some reason was not legally authorized to take testimony. He suggested the further illustration of a witness, who had not been validly sworn, testifying falsely before a judicial body with the intent to commit perjury.[20] The court pointed out that in both situations the elements of an attempt have been met, namely, a specific intent to commit perjury and an act tending directly towards its commission, but that in neither case would a conviction of perjury be possible.[21] Although the attempted perjury conviction in the instant case appears to have been a compromise verdict, the court has shown that the offense is well within the scope of Louisiana's general attempt article.

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16. LA. R.S. 14:36 (1950). See CLARK & MARSHALL, LAW OF CRIMES § 114 (5th ed. 1952).

17. LA. R.S. 14:26 (1950). See State of Louisiana *ex rel.* Duhon v. General Manager, Louisiana State Penitentiary, La. Sup. Ct. Docket No. 39,091 (1948) (unreported), 9 LOUISIANA LAW REVIEW 413 (1949).

18. LA. R.S. 14:27(3) (1950).

19. LA. R.S. 15:406 (1950).

20. State v. Latiolais, 225 La. 878, 881, 74 So.2d 148, 150 (1954).

21. "Perjury is the intentional making of a false written or oral statement in, or for use in, a judicial proceeding, or any proceeding before a board or official, *wherein such board or official is authorized to take testimony.* . . . [T]he false statement *must be made under the sanction of an oath.* . . ." (Emphasis added.) LA. R.S. 14:123 (1950).